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Criminal Procedure—Due Process Requires Counsel in Wayward Minor Proceeding

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Although it may be reasonable after indictment to require the presence of counsel, since it can be assumed that after indictment the State probably has its case prepared and is merely attempting to bolster it by defendant's admissions, this does not seem to be the case after arrest. This may have been Judge Van Voorhis' real reason for dissenting in *Waterman*.

The actual application of the principal case is not clear. As has been previously stated, police officers are not required to inform the defendant of his rights. Since these precedents were not overruled, the question remains whether the right to counsel is absolute after arrest, or whether it is only the failure to answer the defendant's inquiry which renders the statement inadmissible. If the principal case's holding is to be construed as giving an absolute right to counsel, it may have a serious effect on the administration of criminal justice; if it is to be restricted to the case where the inquiry goes unanswered, what is the result if the inquiry is answered "yes" or "no"?

It is difficult to predict the exact future effect of the principal case. It is clear at this point that after indictment, counsel must be present at all questionings. Although a recent decision in the Appellate Division held that the right to counsel was absolute after arrest,[67] this writer doubts if the Court of Appeals will go that far.

R. E. N.

DUE PROCESS REQUIRES COUNSEL IN WAYWARD MINOR PROCEEDING

Since the turn of the century, the state and federal courts of this country have been harrassed by the problem of balancing the needs implicitly expressed in social-reform legislation with the constitutional commandments they have sworn to uphold. One area in which this "balancing" problem has been acutely difficult concerns the crimes or misconduct of infants. Juvenile Delinquency and Wayward Minor Statutes seek to rehabilitate a child in preference to administering punishment. The most popular method of achieving this goal is to relax the protections of the ordinary trial process so that sociological and psychological considerations may be dispositive. While the courts may admire this end, the burden remains with them to determine when the process of relaxation shades into a denial of constitutional rights. The leading case of *People v. Lewis*[68] presented just such a confrontation in 1932, and the recent case of *People v. James*,[69] vividly illustrates that the problem is still with us, little diminished in difficulty.

Title VII-A of the Code of Criminal Procedure,[70] first added to the statute books in 1923, provides the procedure for hearing wayward minor charges. In its current form it provides that any magistrate other than a justice of the peace may, upon an information laid before him by a variety of persons, hear

67. People v. Meyer,—A.D.2d—(1st Dep't October 10, 1961).
68. 260 N.Y. 171, 183 N.E. 353 (1932).
69. 9 N.Y.2d 82, 211 N.Y.S.2d 170 (1961).
70. N.Y. Code Crim. Proc. §§ 913-a to 913-dd.

and determine the charge upon *competent evidence.* The proceedings are applicable only to persons between the ages of 16 and 21, and are to be conducted in courts of criminal jurisdiction according to the Code of Criminal Procedure. The Penal Law, Section 486, provides that, for crimes other than those punishable by death or life imprisonment, a person between the ages of 7 and 16 shall be treated as a juvenile delinquent. Portions of the Children's Court Act define that treatment. Upon *sufficient evidence* a judge exercising jurisdiction under the Act may determine that the child has been delinquent. No formal rules of evidence need be followed, nor does the Code of Criminal Procedure govern in any manner. For purposes of comparison, the pertinent provisions are set out below.

I. Definitions

Wayward Minor (James)—Code of Criminal Procedure, Section 913-a.

Wayward minor.—Any person between the ages of sixteen and twenty-one who either (1) is habitually addicted to the use of drugs or the intemperate use of intoxicating liquors, or (2) habitually associates with dissolute persons, or (3) is found of his or her own free will and knowledge in a house of prostitution, assignation or ill fame, or (4) habitually associates with thieves, prostitutes, pimps, or procurers, or disorderly persons, or (5) is wilfully disobedient to the reasonable and lawful commands of parent, guardian or other custodian and is morally depraved or is in danger of becoming morally depraved, or (6) who without just cause and without the consent of parents, guardians or other custodians, deserts his or her home or place of abode, and is morally depraved or is in danger of becoming morally depraved, or (7) who so deports himself or herself as to wilfully injure or endanger the morals or health of himself or herself or of others, may be deemed a wayward minor. The interstate compact on juveniles shall apply to wayward minors to the same extent as to minors below sixteen years of age except that the provisions of article four of said compact shall apply only to wayward minors included within (6) hereof.

Juvenile Delinquent (Lewis)—Children's Court Act, Section 2(2).

"Delinquent child" means a child (a) who violates any law or any municipal ordinance or who commits any act which, if committed by an adult, would be a crime, except any child fifteen years of age who commits any act which if committed by an adult would be a crime punishable by death or life imprisonment, unless an order removing the action to the children's court has been made and filed pursuant to section three hundred twelve-c, subdivision (c) and section three hundred twelve-f, subdivisions (a) and (b) of the code of criminal procedure; (b) who is incorrigible, ungovernable or habitually disobedient and beyond the control of his parents, guardian, custodians or other lawful authority; (c) who is habitually truant; (d) who, without just cause and without the consent of his parent, parents, guardians or other custodian, repeatedly deserts his home or place of abode; (e) who engages in any occupation which is in violation of law, or who associates with immoral or vicious persons; (f) who frequents any

place the existence of which is in violation of law; (g) who habitually uses obscene or profane language; (h) who begs or solicits alms or money in public places under any pretense; or (i) who so deports himself as to wilfully injure or endanger the morals or health of himself or others.

II. Jurisdiction and Manner of Jurisdiction

Wayward Minor (James)—Code of Criminal Procedure, Section 913-b. Person may be adjudged a wayward minor.—Such person, where the charge is established upon competent evidence upon a hearing, may be so adjudged by any magistrate, other than a justice of the peace, where an information is laid before him on the complaint of a peace officer, parent, guardian, or other person standing in parental relation or being the next of kin, *or a principal or teacher of any school where such person is registered for attendance,* or by a representative of an incorporated society doing charitable or philanthropic work.

Juvenile Delinquent (Lewis)—Children's Court Act, Section 4, vests jurisdiction exclusively in the Children's Court. Section 22 provides for an informal hearing.

III. Effect of Adjudication

Wayward Minor (James)—Code of Criminal Procedure, Section 913-dd. Effect of adjudication.—In the event any person is adjudged a wayward minor under the provisions of this title, such determination shall not operate as a disqualification of any such person subsequently to hold public office, public employment, or as a forfeiture of any right or privilege or to receive any license granted by public authority; and no such person shall be denominated a criminal by reason of such determination, nor shall such determination be deemed a conviction.

Juvenile Delinquent (Lewis)—Children's Court Act, Section 45.

4. No adjudication under the provisions of this act shall operate as a disqualification of any child subsequently to hold public office or as a forfeiture of any right or privilege or to receive any license granted by public authority; and no child shall be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction. Neither the fact that a child has been before the children's court for hearing nor any confession, admission, or statement made by him to the court or to any officer thereof while he is under the age of sixteen years, shall ever be admissible as evidence against him or his interests in any other court.

Comparison makes it apparent that, while both statutes aim at a relaxation of the ordinary criminal process, the Wayward Minor Provisions do not constitute as radical a departure as the Juvenile Delinquency Sections, in particular Section 22.

In *People v. James*,[71] defendant, then 16 years old, was charged with

71. Supra note 69.

being drunk, disobedient to his mother, truant from school and in danger of becoming morally depraved, all in violation of Section 913-a of the Wayward Minors Law. He was first brought before the City Magistrates Court of New York City, a criminal court, on the strength of the complaint made by his mother. He was carelessly advised of his right to secure counsel by a court officer and immediately thereafter put on probation upon the recommendation of a social worker assigned to the case. Two months later, at the request of his mother and the probation department, the charges were heard, judgment entered and sentence imposed. No advice as to the defendant's right to counsel or his privilege against self-incrimination was proffered at this second hearing, and it appears that there was serious dispute as to whether the defendant had acted as his mother charged.

In *People v. Lewis*,[72] defendant, then 15 years old, was charged with stealing $12.00 from a Binghamton, New York grocery store, escaping with his companions to Buffalo in a stolen car. His hearing was before a judge acting under the provisions of the then newly instituted Children's Court Act. There was no acrimony; the delinquent was comforted by the sympathy of family and clergy, and there was no dispute as to the facts. The constitutional problem arose when the defendant was not advised of the self-incrimination privilege; his guilt was established exclusively on the basis of his own confession.

Defendant James, charged with being "wayward," was held to have been deprived of a constitutional right to secure counsel. Defendant Lewis, charged with criminal conduct, was held not to have been so deprived.

The Court, in striking its balance, made special reliance on certain distinctions between *James* and *Lewis* as follows:

1. The *Lewis* proceeding was held in Children's Court, while the *James* case was tried in a court of criminal jurisdiction.
2. Similarly, *Lewis* involved the Children's Court Act while the Code of Criminal Procedure governed *James*.
3. In *Lewis* there was no dispute as to the salient facts establishing guilt, while in *James*, the testimony was completely contradictory, making the latter proceeding of an adversary nature.
4. In *Lewis*, the minor had the support and comforting presence of his mother, sister and clergyman, while in *James*, the mother was the hostile complainant and as well, the defendant had not a friend in court.

With these findings setting the tenor of the proceedings below, and after setting forth the perfunctory notice given defendant of his right to counsel, the Court held that, "elementary principles of justice would seem to require that in this situation the testimony of the mother should have been tested by some form of cross-examination . . . ," and "the rights of the defendant minor were not adequately protected without the aid of counsel."[73]

72. Supra note 68.
73. People v. James, supra note 69 at 85, 211 N.Y.S.2d at 174.

In *Lewis*, the Court was also interested in the "coloring" of the events surrounding the proceeding, but for it the first question was whether or not the legislature could constitutionally enact as it had. Finding the power to be in the legislature, the natural consequence was a decision stating that in a non-criminal trial, there was no right to criminal constitutional safeguards. While it is true that Judge Couch wrote a strong dissent, in contrast to the unanimous opinion rendered in *James*, a reading of the two cases, one after the other, leaves one with the feeling that the 1932 court was far surer of the absoluteness of the consequences flowing from its answer to the "first question." There was no great concern evidenced then in regard, for instance, to the presence or absence of friends in court.

This "feeling" or " intuition" that the balancing problem is today more frustrating than it was 30 years ago is heightened by a cataloguing of some of the other factors bearing on the case. The Court was here faced with the legislature's decision requiring it to enforce constitutional guarantees more strictly in a case of non-criminal conduct (truancy-James) than it would in a case of criminal conduct (larceny-Lewis), a rather anomalous situation. Looking ahead, the Court might ponder the value of its decision as a guideline in the face of the ever-impending, but now repealed Youth Court Act, which, if ever passed, will eliminate the problem entirely.[74] Still another consideration before the Court was the possible erosion of the *Lewis* doctrine that might ensue from a decision contradicting its principles.

This latter problem was disposed of when the Court said "we find it unnecessary to re-examine the doctrine announced in the *Lewis* case: . . ." Counsel for defendant took much space in his brief in an attempt to convince the Court that Judge Crouch was really right after all. Such an effort indicates that counsel was not impressed with his position on the other matters. As is evident from the phrase above quoted, the Court saw little merit in beating a dead horse. The differences in the statutory outline, the necessity of the established procedure to the proper functioning of the Children's Court, and the availability of other grounds, militated against such an approach.

One of the "other grounds" just mentioned is the "nature of the proceedings" test. The use of this device apparently stems from *In re Clausi*,[75] where *Lewis* was interpreted as declaring that the initial forum of hearing determines the applicability of constitutional safeguards. Thus, a filiation proceeding instituted in Children's Court was civil,[76] but a paternity proceeding in the New York City Court of Special Sessions was criminal.[77] The argument appears in the case, and of the six citations in the opinion, three deal with the

74. The Youth Court Act of 1956 with an effective date put off each year to the next succeeding year, would have provided Juvenile Delinquency type hearings for all minors accused of any form of anti-social conduct. It was repealed by N.Y. Sess. Laws 1961.
75. 296 N.Y. 354, 73 N.E.2d 548 (1947).
76. Ibid.
77. Commissioner of Public Welfare v. Simon, 270 N.Y. 188, 200 N.E. 781 (1936).

topic. It is puzzling to ponder over the court's refusal to make this test the basis of the decision; or, in the alternative, to rely solely on the cited case of *People ex rel. Cohen v. Brown*,[78] which held that a wayward minor must make an intelligent waiver of his right to counsel. Curiously missing in the briefs of counsel and in the Court's opinion is *People v. Shannon*,[79] a well-reasoned recent Appellate Division case. There it was held that *youthful offender* proceedings were "criminal in nature," that *Lewis* was not controlling for that very reason, and that defendant could not "be convicted on his confession, standing alone." The Youthful Offender Provisions appear immediately after the Wayward Minor Sections. Their Section 913-n is the exact duplicate of Section 913-d of the Wayward Minor provisions and Section 45 of the Children's Court Act. There seems to be no substantial distinction between the cases. What may be said of one holds with equal impact for the other. But all the Court of Appeals was willing to say on the matter was that "there is some grounds for the assertion that it [*James*] was criminal in nature."[80]

Perhaps the explanation lies in an examination of the basis for decision chosen by the Court. It has this merit; without expressly withdrawing from *Lewis*, and without foreclosing the question regarding the nature of a wayward minor proceeding, it has left itself an opening to pick and choose among the situations where, to its mind, wayward minors should be given the constitutional safeguards of a criminal trial. The method chosen has this obvious defect; the courts of original jurisdiction will be less surehanded in using their discretion to determine whether they are involved in the process of "saving" a child or "punishing" a criminal.

E. H.

ASSIGNMENT OF COUNSEL IS WITHIN DISCRETION OF COURT

A defendant accused of a felony may not be denied his right to counsel under our concept of a fair hearing, this right encompassing both the engagement of an attorney and the assignment by the court for an indigent defendant.[81] In New York, if a defendant appears for arraignment without counsel, the court must ask if he desires one, and if so the court then must assign counsel.[82] The selection of counsel in the instance of assignment is within the discretionary power of the judge, but to what extent does this discretion exclude the defendant from having a voice in such assignment? Whether this discretion may deny or interfere with the defendant's right to counsel, either in his inherent right to select and engage an attorney of his own choice, or in the manner of such assignment was the fundamental problem confronting the Court in *People v. Brabson*.[83]

78. 278 App. Div. 576, 102 N.Y.S.2d 1 (2d Dep't 1951).
79. 1 A.D.2d 226, 149 N.Y.S.2d 550 (2d Dep't 1956).
80. People v. James, supra note 1 at 85, 211 N.Y.S.2d at 174.
81. People v. Price, 262 N.Y. 410, 187 N.E. 298 (1933).
82. N.Y. Code Crim. Proc. § 308.
83. 9 N.Y.2d 173, 212 N.Y.S.2d 403 (1961).